

HAGENS BERMAN SOBOL SHAPIRO LLP

Robert B. Carey #011186
Donald Andrew St. John #024556
2425 East Camelback Road, Suite 650
Phoenix, Arizona 85016
Telephone: (602) 840-5900
Facsimile: (602) 840-3012
E-Mail: andy@hbsslaw.com

HAGENS BERMAN SOBOL SHAPIRO LLP

Steve W. Berman WSBA #12536
Tom Loeser WSBA #38701
Genessa Stout WSBA #38410
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
E-Mail: steve@hbsslaw.com
toml@hbsslaw.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

NATHANIEL JOHNSON and KRISTEN
PETRILLI, ABRAHAM NIETO; GLORIA
and CHARLES LEWIS; FABIAN and
MARIE PATRON, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

KB HOME, a Delaware corporation;
COUNTRYWIDE FINANCIAL
CORPORATION, a Delaware corporation;
COUNTRYWIDE HOME LOANS, INC., a
New York corporation; COUNTRYWIDE
MORTGAGE VENTURES, LLC, a
Delaware company; COUNTRYWIDE-KB
HOME LOANS, an unincorporated
association of unknown form, LANDSAFE,
INC., a Delaware corporation; LANDSAFE
APPRAISAL SERVICES, INC., a California
corporation; and DOES 1 through 1000,

Defendants.

No. CV-09-972-PHX-FJM

**PLAINTIFFS' OPPOSITION TO
MOTION OF COUNTRYWIDE/
LANDSAFE DEFENDANTS TO
DISMISS FIRST AMENDED
CLASS ACTION COMPLAINT**

TABLE OF CONTENTS

		<u>PAGE</u>
1		
2		
3	I. INTRODUCTION.....	1
4	II. ARGUMENT	2
5	A. The Complaint States Claims that are Plausible	2
6	B. The Complaint Alleges Valid RICO Claims.....	6
7	1. Plaintiffs allege RICO predicate acts with particularity	6
8	2. Plaintiffs allege that fraudulent appraisals caused them to suffer	
9	losses	9
10	3. The Complaint Adequately Alleges a Pattern of Racketeering	
11	Activity.....	11
12	a. Plaintiffs adequately allege closed-ended continuity.....	11
13	b. Plaintiffs adequately allege open-ended continuity	13
14	4. The Complaint Adequately Alleges Two RICO Enterprises	14
15	a. The “Countrywide Enterprise” Satisfies Any	
16	“Distinctiveness” Requirement.....	14
17	b. Both Enterprises engaged in ongoing behavior	16
18	c. Plaintiffs are not required to allege that the members	
19	of the enterprise share a fraudulent purpose	16
20	5. The RICO Conspiracy Claim is Adequately Alleged	17
21	C. The Complaint Adequately Alleges a Claim Under the California	
22	UCL.....	17
23	1. Plaintiffs Have Standing Under the UCL	17
24	2. The Complaint Adequately Pleads a California Nexus	18
25	3. The Complaint Alleges a Claim Under the UCL.....	19
26	D. The Complaint Adequately Alleges a Claim for Unjust Enrichment	22
27	III. CONCLUSION	23
28		

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
<i>Acciard v. Whitney</i> , 2008 U.S. Dist. Lexis 98131 (M.D. Fla. Dec. 4, 2008)	7
<i>Aetna Casualty Sur. Co. v. P&B Autobody</i> , 43 F.3d 1546 (1st Cir. 1994)	7
<i>Allwaste, Inc. v. Hecht</i> , 65 F.3d 1523 (9th Cir. 1995).....	14
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009)	2
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	2
<i>Bridge v. Phoenix Bond & Indem. Co.</i> , 128 S. Ct. 2131 (2008)	10, 11
<i>Brown v. Cassens</i> , 546 F.3d 347 (6th Cir. 2008).....	11, 13
<i>Cazares v. Pac. Shore Funding</i> , 2006 U.S. Dist. Lexis 1081 (C.D. Cal. Jan. 3, 2006)	20
<i>Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund</i> , 24 Cal. 4th 800 (2001).....	19
<i>Cisneros v. U.D. Registry, Inc.</i> , 39 Cal. App. 4th 548 (1995).....	19
<i>Citizens for a Better Env't v. Union Oil</i> , 996 F. Supp. 934 (N.D. Cal. 1997)	19
<i>Cortez v. Purolator Air Filtration Prods. Co.</i> , 23 Cal. 4th 163 (2000).....	20
<i>In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.</i> , 601 F. Supp. 2d 1201 (S.D. Cal. 2009)	4, 14, 15
<i>Diaz v. Gates</i> , 420 F.3d 897 (9th Cir. 2005).....	9, 10
<i>First Capital Asset Mgmt., Inc. v. Satinwood, Inc.</i> , 385 F.3d 159 (2d Cir. 2004).....	16
<i>First Magnus Fin. Corp. v. Star Equity Funding, L.L.C.</i> , 2007 U.S. Dist. Lexis 8109 (D. Kan. Feb. 2, 2007)	8
<i>Ford v. Hotwire, Inc.</i> , 2007 U.S. Dist. Lexis 98370 (S.D. Cal. Nov. 19, 2007)	22

1	<i>Friedman v. 24 Hour Fitness USA, Inc.</i> ,	
2	580 F. Supp. 2d 985 (C.D. Cal. 2008).....	16, 17
3	<i>Gray v. Upchurch</i> ,	
4	2006 U.S. Dist. Lexis 90184 (S.D. Miss. Dec. 13, 2006)	8
5	<i>H.J., Inc. v. Northwestern Bell Tel. Co.</i> ,	
6	492 U.S. 229 (1989)	13
7	<i>Howard v. America Online, Inc.</i> ,	
8	208 F.3d 741 (9th Cir. 2000).....	13
9	<i>Ikuno v. Yip</i> ,	
10	912 F.2d 306 (9th Cir. 1990).....	14
11	<i>Kay v. Wells Fargo & Co. N.A.</i> ,	
12	2007 WL 2141292 (N.D. Cal. 2007).....	21
13	<i>King v. California</i> ,	
14	784 F.2d 910 (9th Cir. 1986).....	21
15	<i>Kuehn v. Stanley</i> ,	
16	208 Ariz. 124 (Ct. App. 2004)	6
17	<i>Lawyers Title Ins. Corp. v. Dearborn Title Corp.</i> ,	
18	118 F.3d 1157 (7th Cir. 1997).....	21
19	<i>Lee v. City of Los Angeles</i> ,	
20	250 F.3d 668 (9th Cir. 2001).....	4
21	<i>McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.</i> ,	
22	339 F.3d 1087 (9th Cir. 2003).....	23
23	<i>Odom v. Microsoft Corp.</i> ,	
24	486 F.3d 541 (9th Cir. 2007).....	15, 17
25	<i>Oki Semiconductor Co. v. Wells Fargo Bank</i> ,	
26	298 F.3d 768 (9th Cir 2002).....	10, 11
27	<i>Paulus v. Bob Lynch Ford, Inc.</i> ,	
28	139 Cal. App. 4th 659 (2006).....	21
	<i>People ex rel. Bill Lockyer v. Fremont Life Ins. Co.</i> ,	
	104 Cal. App. 4th 508 (2002).....	19
	<i>Religious Tech. Ctr. v. Wollersheim</i> ,	
	971 F.2d 364 (9th Cir. 1992).....	13
	<i>Sage v. Blagg Appraisal Co.</i> ,	
	221 Ariz. 33 (Ct. App. 2009)	6
	<i>Schmuck v. United States</i> ,	
	489 U.S. 705 (1989)	11
	<i>Sun Sav. & Loan Ass'n v. Dierdorff</i> ,	
	825 F.2d 187 (9th Cir. 1987).....	14

1	<i>Turner v. Cook,</i>	
2	362 F.3d 1219 (9th Cir. 2004).....	12
3	<i>United States v. Feldman,</i>	
4	853 F.2d 648 (9th Cir. 1988).....	16
5	<i>United States v. Fullwood,</i>	
6	342 F.3d 409 (5th Cir. 2003).....	7
7	<i>United States v. Kohli,</i>	
8	110 F.3d 1475 (9th Cir. 1997).....	6
9	<i>United States v. Nguyen,</i>	
10	504 F.3d 561 (5th Cir. 2007).....	7
11	<i>United States v. Owens,</i>	
12	301 F.3d 521 (7th Cir. 2002).....	7
13	<i>United States v. Panza,</i>	
14	750 F.2d 1141 (2d Cir. 1984).....	7
15	<i>Webb v. Smart Document Solutions, LLC,</i>	
16	499 F.3d 1078 (9th Cir. 2007).....	20
17	<i>Zaldana v. KB Home,</i>	
18	2009 U.S. Dist. Lexis 42409 (N.D. Cal. May 8, 2009).....	20

STATUTES AND REGULATIONS

19	12 C.F.R. § 34.44.....	21, 22
20	18 U.S.C. § 1964(c).....	10
21	A.R.S. § 32-3633	22

I. INTRODUCTION

The unabridged motion (“Motion”) of the Countrywide/Landsafe defendants to dismiss the first amended complaint (“FAC”) should be denied in its entirety.¹

First, there is no merit to Countrywide’s arguments that Plaintiffs do not state a claim under RICO. First, Plaintiffs’ claims are facially plausible. The FAC identifies Countrywide’s role in the Inflated Appraisal Scheme and why it undertook the Scheme. Countrywide’s interpretation of the purchase contracts at issue here is untenable; and its claim that its participation in the Scheme would be “ludicrous” banking policy is not an impeachment of the FAC, but rather an appropriate indictment of its behavior during the tail-end of the mortgage boom-and-bust that nearly brought this country to its economic knees. Second, Plaintiffs allege their RICO claim with particularity, explaining in detail how Defendants used fraudulent appraisals (which constitute mail fraud) in violation of RICO. Third, Plaintiffs adequately identify: (1) the harms they suffered as a result of the Scheme; (2) a pattern of racketeering activity; and (3) two distinct RICO Enterprises.

Plaintiffs also state valid claims for violation of California’s Unfair Competition Law (“UCL”) and for unjust enrichment. Countrywide’s injury and causation arguments fare no better in their second invocation against Plaintiffs’ UCL claims just as they do as against the RICO claims. The UCL applies to Defendants’ misconduct, because Plaintiffs allege in detail that their injuries were caused by conduct occurring in California, where Countrywide, KB Home, and their joint venture are all headquartered and where they designed and implemented the Inflated Appraisal Scheme. Further, Plaintiffs state a valid claim under the UCL based, in part, on violations of RICO, RESPA, the Uniform Standards of Professional Appraisal Practice (“USPAP”), and Arizona law. Finally, Plaintiffs state a valid claim for unjust enrichment because no contract controls the liability of Countrywide to Plaintiffs.

¹ In the first sentence of its overlength Motion, Countrywide incorrectly claims that the FAC is a “blunderbuss” complaint, citing an inapposite decision concerning the sale of off-label drugs. Countrywide would be better served to focus on relevant cases rather than find an isolated, inapposite case to attack Plaintiffs and their counsel.

II. ARGUMENT

A. The Complaint States Claims that are Plausible

Countrywide's first argument is that Plaintiffs' claims fail because it is implausible that Defendants have engaged in the wrongs alleged in the First Amended Complaint ("FAC"). *See* Motion at 14-21. But Defendants' implausibility argument rests on "facts" which are (1) contrary to the facts alleged in the FAC; and (2) the result of a contractual interpretation that is simply nonsense. The legal standard set forth in *Twombly* and in *Iqbal*² amply support Plaintiffs' claims here. The FAC is replete with "factual content" that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Rather than apply these facts that are alleged in the FAC, Countrywide supplies its own "facts" and then applies the legal standard to "facts" as it casts them. However, in a motion to dismiss, even after *Twombly* and *Iqbal*, this it cannot do.

The central "fact" on which Countrywide relies in its plausibility argument is that irrespective of what value the tainted appraisal assigned to a KB Home purchaser's property, that purchaser would still be bound to purchase the property at the contracted price. As if by repeating it over and over it will make it come true, Countrywide insists that the purchase contracts at issue were not contingent on appraisals at value or even the ability of the purchaser to acquire the purchase-money financing. *See* Motion at 2, 3, 4, 6, 14-18, 20-21. That assertion is wrong both as a matter of contract interpretation, and as a matter of common sense. The contractual term at issue states, in pertinent part:

5.3 Loan Approval; Disapproval. Buyer shall, in good faith, apply for a Loan and diligently pursue Loan approval. Buyer acknowledges that Buyer's obligation to purchase the Property is not contingent upon Buyer obtaining Loan approval and that Buyer's Deposit shall become non-refundable to Buyer on the Non-Refundable Deposit Date, (as defined in the Key Date Addendum to Purchase Agreement) irrespective of whether the Loan is approved. Additionally, *if Buyer fails to obtain written verification from Lender of*

² *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

1 *unconditional Loan approval within thirty (30) days after the*
 2 *“Original Sale Date” as set forth in the Key Date Addendum,*
 3 *or any other time period as agreed to by Buyer and Seller, in*
 writing, then Buyer or Seller may, by written notice to the
 other and to Escrow holder, cancel this Agreement.

4 (Emphasis added.) When read in its entirety, this contractual term does not mean that the
 5 buyers are bound to complete the transaction even if they cannot obtain financing, as
 6 Countrywide argues. If that were true then “Buyer or Seller may, by written notice to the
 7 other and to Escrow holder, cancel this Agreement” – would be meaningless. Instead this
 8 clause provides that even if buyers do not obtain loan approval, they will still forfeit the
 9 deposit if the resulting cancellation occurs after the “Non-Refundable Deposit Date.”

10 Countrywide’s foray into contract interpretation fails the common sense test as
 11 well. If KB Home could truly “force” any person to follow through on the purchase
 12 contract, even if such person could not get financing, where would the purchase money
 13 come from? As any homeowner and any lender, except perhaps the nation’s one-time
 14 largest lender, Countrywide, understands, purchase-money financing is an integral part of
 15 any home purchase agreement and the failure to obtain financing kills the deal.

16 Countrywide then incorrectly claims that it “‘would be a ludicrous banking policy’
 17 that lacks any facial plausibility” for it to intentionally write make “bad loans” to finance
 18 inflated KB Home purchases. Motion at 14. But this is precisely what is alleged in
 19 factual detail in the Complaint. Countrywide had no interest in the quality of the loans
 20 that it made. *See, e.g.,* FAC ¶ 48 (“‘rampant disregard for underwriting standards’ at
 21 Countrywide in the interest of pushing through as many loans as possible.”) It was paid
 22 for originating loans and selling loans in the secondary market. The more loans, and the
 23 higher the face value of the loans, the more money Countrywide made. Whether the
 24 buyer would eventually repay the loan, or even whether the buyer could make the second
 25 or third payment simply did not matter at all to Countrywide. But these are not mere
 26 allegations devoid of factual basis as Countrywide would have the Court believe. The
 27 FAC supports these allegations with specifics from insiders and from court orders and
 28 pleadings in cases against Countrywide that further detail its drive for excess profit

1 through writing as many loans as possible, irrespective of the quality of such loans. *See,*
 2 *e.g.*, FAC ¶¶ 43-46, 48.

3 As set forth in the FAC, the inflated appraisals at issue were the centerpiece of the
 4 Inflated Appraisal Scheme because these allowed Countrywide to make – and then sell in
 5 the secondary market – loans that it otherwise could not have made, and it allowed KB
 6 Home to sell their houses at values higher than the true market would have allowed.
 7 FAC ¶¶ 48, 85.

8 The implausibility argument is undercut by several other facts. First, this is not
 9 the first case that alleges that Countrywide engaged in a far reaching scheme to write as
 10 many over valued loans and possible. As further support of the notion that Countrywide
 11 now claims is “ludicrous,” that it purposefully wrote bad loans to make money, Plaintiffs
 12 note the raft of lawsuits against Countrywide alleging exactly that including: (1) a
 13 shareholder derivative action cited at Paragraph 48 of the FAC;³ (2) On June 4, 2009, the
 14 SEC filed a complaint for violations of securities laws against Countrywide executives
 15 Angelo Mozilo, David Sambol and Eric Sieracki.⁴ The SEC complaint details
 16 Countrywide’s abandonment of underwriting standards in its relentless drive to capture
 17 market share, profits, and individual income; and (3) a nationwide class action attacking
 18 Countrywide’s lending practices details how and why Countrywide sought to make as
 19 many loans as possible to fuel its ambition and greed.⁵ The Court in that RICO case
 20 denied Countrywide’s motion to dismiss, upholding enterprise allegations mirroring the
 21

22 ³ *See In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044 (C.D. Cal.
 23 2008) (Order on motions to dismiss) and Class Action Complaint, attached as Ex. A to
 24 the Berman Declaration. As Countrywide notes, “under Fed. R. Evid. 201, a court may
 take judicial notice of matters of public record.” *Lee v. City of Los Angeles*, 250 F.3d
 668, 689 (9th Cir. 2001).

25 ⁴ *SEC v. Mozilo et al.*, Case No. CV 09-03994-VBF. A copy of the SEC complaint is
 attached as Ex. B to the Berman Declaration.

26 ⁵ *See In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, Case No.
 27 08-MD-01988 (S.D. Cal.). A copy of the complaint is attached as Ex. C to the Berman
 Declaration. *See also In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices*
 28 *Litig.*, 601 F. Supp. 2d 1201 (S.D. Cal. 2009), and Berman Decl., Ex. D for the Orders
 sustaining the RICO Enterprises alleged in that case.

1 allegations in this case.⁶ Not only have these cases survived motions to dismiss, they
 2 have done so where the plaintiff had to plead scienter, a burden not present here.

3 Second, the argument ignores specific factual allegations documenting the
 4 scheme. *See* FAC, ¶¶ 104-106 (a former employer explaining how he complained about
 5 the scheme to senior management); ¶ 100 (internal email regarding pushing values to
 6 meet the contract amount; ¶ 91 (outlining meeting where executives explained the
 7 scheme); ¶¶ 113-124 (showing inflated appraisals on homes in California); ¶¶ 127-151
 8 (detailing plaintiffs' fraudulent appraisals). What is implausible is that all of these facts
 9 could be plead absent the scheme described. At the very least, these facts overcome the
 10 pleading requirements set forth in *Iqbal* and *Twombly*.

11 Countrywide's reliance arguments also fail legally and betray a radical re-casting
 12 of the allegations in the FAC. Countrywide says that the appraisals played no role in the
 13 purchase decisions because they occurred long after the purchase contracts were
 14 executed. *See* Motion at 17-19. While Countrywide has the timing of events right, it
 15 appears not to have read the allegedly "blunderbuss" complaint that it is attacking. The
 16 FAC nowhere alleges that Plaintiffs relied on appraisals *before* agreeing to buy KB Home
 17 properties. Instead it claims that when the KB Home properties were substantially
 18 completed and appraised, fraudulently inflated appraisals were commissioned to support
 19 loans that Plaintiffs would not and could not have entered into, and that an *honest lender*
 20 would not have made, had the true values of the properties been revealed in honest
 21 appraisals. *See, e.g.*, FAC ¶ 88 ("Since Countrywide controlled the appraisal process
 22 through exclusive use of complicit LandSafe employees, Countrywide was able to inflate
 23 and control the sales prices of KB Homes"). Countrywide apparently overlooks the FAC
 24 to the extent that it states that it too was complicit in the scheme. Had an honest
 25 appraiser *and an honest lender* been involved instead, then loan approval would never
 26 have been given and, per the contractual term, "Buyer or Seller may, by written notice to
 27 the other and to Escrow holder, cancel this Agreement."

28 ⁶ *See supra*, n.3.

1 The cases Countrywide cites do not further its argument. *Kuehn v. Stanley*, 208
 2 Ariz. 124, 128 (Ct. App. 2004), is inapposite because it did not involve the measured
 3 participation of each the seller, the appraiser *and* the lender as is alleged here. The *Kuehn*
 4 plaintiffs were required to show their own detrimental reliance *on the tainted appraisal* in
 5 order to succeed. Here, in contrast, under RICO, no such showing is required. *See infra*
 6 Section III.b.2. Even apart from that distinguishing factor, Countrywide cites the more
 7 recent and more applicable case, *Sage v. Blagg Appraisal Co.*, 221 Ariz. 33, 36 (Ct. App.
 8 2009), which held that when a purchase agreement can be cancelled for an over-inflated
 9 appraisal, a fraud action will be upheld. Here, as the purchase contract all Plaintiffs
 10 signed provide, Plaintiffs could cancel the agreements if they did not get loan approval.
 11 As the FAC alleges, no honest lender would have provided loan approval based on the
 12 inflated appraisals at issue in this case. *E.g.*, FAC ¶ 89 (“Forcing buyers to use KB-
 13 Countrywide as the lender was essential to the Scheme as another lending institution
 14 might use a truly independent appraiser who in turn would unravel the inflated appraisal
 15 scheme by appraising at a price that was below the contract value.”).

16 Because, as set forth in the purchase contracts and as squarely alleged in the FAC,
 17 the Countrywide loans and the KB Home sales at issue would not and could not have
 18 been consummated absent the inflated appraisals and corrupt lending practices of
 19 Countrywide, Countrywide’s implausibility argument utterly fails.

20 **B. The Complaint Alleges Valid RICO Claims**

21 **1. Plaintiffs allege RICO predicate acts with particularity**

22 Countrywide erroneously asserts that Plaintiffs fail to allege predicate acts with
 23 particularity. *See* Motion at 23-25. In fact, Plaintiffs allege in detail that Defendants
 24 implemented a scheme based on fraudulent appraisals, which numerous courts have held
 25 constitute mail fraud. For example, in *United States v. Kohli*, 110 F.3d 1475, 1476 (9th
 26 Cir. 1997), the defendants pled guilty to mail fraud in the sale of homes by “fraudulently
 27 inducing lenders to make loans on the properties after inflated appraisals.” *See also*
 28 *United States v. Nguyen*, 504 F.3d 561, 568 (5th Cir. 2007) (affirming conviction for mail

1 fraud based on false representations, because “a rational jury could find beyond a reason-
 2 able doubt that Myna knew that the sales prices and loan amounts for the Fox Hunt and
 3 Silvercrest properties stemmed from false appraisals”); *United States v. Fullwood*, 342
 4 F.3d 409 (5th Cir. 2003); *United States v. Owens*, 301 F.3d 521, 528 (7th Cir. 2002)
 5 (affirming conviction for scheme that relied on fraudulent appraisals, where the “jury’s
 6 conclusion that Owens had an intent to defraud is also supported by the abundant
 7 evidence that Owens received ‘kickbacks’ for his artificially-inflated appraisals”).

8 Moreover, courts have sustained RICO allegations based on fraudulent appraisals,
 9 which constitute the predicate act of mail or wire fraud. For example, in *Acciard v. Whit-*
 10 *ney*, 2008 U.S. Dist. Lexis 98131, *10 (M.D. Fla. Dec. 4, 2008), the plaintiffs sued the
 11 defendants under RICO for fraudulent sales of real estate, basing their claims in part on
 12 defendants’ use of a “fraudulent appraisal value for the property.” The defendants argued
 13 that the plaintiffs failed to allege fraud with particularity, but the court disagreed:

14 Plaintiffs have identified the false statements that were made
 15 – the fraudulent appraisal values. Plaintiffs allege that United
 16 Mortgage, which is alleged to be an agent of First Community
 17 Bank, provided loan documents to Plaintiffs containing the
 18 fraudulent appraisals. Plaintiffs also allege that the Lenders,
 19 which include First Community Bank, knowingly utilized the
 20 fraudulent appraisal and that the fraudulent appraisals and
 21 financing were key to the fraudulent scheme. Accordingly,
 22 the Court finds that Plaintiffs meet the particularity require-
 23 ments for pleading fraud in this case.

24 *Id.* at *15-16. In denying the motion to dismiss the RICO claim, the court explained that
 25 “Plaintiffs allege that Huron coerced or attempted to coerce Plaintiffs to close on perma-
 26 nent financing based on fraudulent appraisal values in order to further the fraudulent
 27 scheme.” *Id.* at *34. Thus, the fraudulent appraisals constituted the fraud necessary to
 28 support the RICO claim. *See also Aetna Casualty Sur. Co. v. P&B Autobody*, 43 F.3d
 1546, 1562 (1st Cir. 1994) (scheme to defraud insurance company by submission of
 “fraudulent appraisals” constituted mail fraud and supported jury verdict that defendants
 violated RICO); *United States v. Panza*, 750 F.2d 1141, 1147 (2d Cir. 1984) (affirming
 RICO convictions for scheme that used “fraudulent appraisals”); *First Magnus Fin. Corp.*
v. Star Equity Funding, L.L.C., 2007 U.S. Dist. Lexis 8109, *14 (D. Kan. Feb. 2, 2007)

(denying motion to dismiss RICO claim where defendant “directed the loan officers to obtain appraisals at pre-determined, inflated values”); *Gray v. Upchurch*, 2006 U.S. Dist. Lexis 90184, *15 (S.D. Miss. Dec. 13, 2006) (denying motion to dismiss RICO claim where complaint set forth “the appraisal fraud and the HUD-1 fraud allegedly perpetrated” by the defendants).

Numerous allegations throughout the Complaint demonstrate that Defendants utilized fraudulent appraisals to carry out their scheme. For example, the FAC alleges:

- “KB Home, Countrywide, and LandSafe ... built, financed, appraised and controlled virtually every aspect of a buyer’s real estate transaction and thus Defendants were in a position to rig and falsify the appraised value of the homes they were selling and financing.” ¶ 7.
- “When an order for an appraisal on a KB Home went to LandSafe, it was routed to a single person at LandSafe, that individual assigned appraisals of KB Home properties to a small group of appraisers who had been specifically approved for each development by KB Home due to their willingness to “play-ball,” *i.e.*, come in with the appraisal at whatever number was necessary to close the deal at the price desired by Countrywide-KB.” ¶ 9.
- “[I]n order to ensure that Plaintiffs’ and Class members’ home transactions would occur at inflated contracted prices for KB homes, notwithstanding the actual and sometimes declining home market between the date of a contract and settlement, the KB-Countrywide Criminal Enterprise steered Plaintiffs and Class members to its complicit appraisers who were under direct instruction to value homes at or above the contract price even if it meant completing appraisals in violation of regulatory guidelines and requirements pertaining to appraisals.” ¶ 10.
- “Plaintiffs’ and Class members’ home appraisals were tainted with false and misleading data, deceptive practices, and violations of the Regulatory standards for professional appraisers including, *inter alia*, the following: (i) Improper selection of distant, dissimilar properties....; (ii) Use of pending transactions as comparable sales ... even when no sale was actually pending because the ostensible buyer had abandoned the transaction; and (iii) The tainted appraisals gave false and misleading statements concerning the generally downward trending real estate market at the time that the appraisals were performed.” ¶ 11.
- “The appraiser’s use of such unverified information and patently faulty methodology demonstrates their complicity in the scheme. In contrast, when a prospective KB Home purchaser was able to have a non-complicit appraiser look at public records of recently closed sales of truly comparable properties, the independent appraisals revealed values far below the KB

Home contract price and the KB Home tainted appraisal to match. In such cases, KB Home often conceded the difference in order to close the sale, but then concealed the facts of these transactions from contemporaneous and subsequent purchasers.” ¶ 13.

- “The inflated sale prices resulting from the tainted appraisals, in turn, infected subsequent appraisals and valuations, allowing the KB-Countrywide Criminal Enterprise to continue to obfuscate falling values. In other words, this was a Madoff-like Ponzi scheme that depended upon the initial use of false appraisals to prop up early sales in a KB Home subdivision, which were then used to continue to prop up the value and selling activity in entire KB Home subdivisions.” ¶ 14.

Moreover, Plaintiffs allege in detail that their appraisals were fraudulent. *See* FAC ¶¶ 127-151. (*See, e.g.*, ¶ 129 (identifying fraudulent nature of Johnson appraisal); ¶ 134 (use of mail to effectuate scheme for Nieto’s appraisal); ¶¶ 143-147 (use of mails to send fraudulent Lewis appraisal); ¶¶ 148-149 (fraudulent Patron appraisal)). These allegations and others throughout the FAC adequately allege predicate acts of mail fraud.⁷

2. Plaintiffs allege that fraudulent appraisals caused them to suffer losses

Countrywide claims that Plaintiffs lack standing because they cannot show that the Inflated Appraisal Scheme caused them injury. *See* Motion at 21-22. This argument is merely a repetition of its flawed “plausibility” argument, which Plaintiffs discuss in Section II(A), above, and it ignores specific allegations to the contrary. FAC ¶¶ 131, 141, 145, 150-151, 205-206 (all alleging specific injury).

Further, there is no merit to Countrywide’s argument that Plaintiffs have failed to allege proximate causation under RICO.⁸ In *Diaz v. Gates*, 420 F.3d 897, 901 (9th Cir. 2005) (en banc), the Court explained the standards for proximate causation under RICO:

The only requirement for RICO standing is that one be a ‘person injured in his business or property by reason of a

⁷ In the midst of its argument about whether Plaintiffs allege predicate acts with particularity, Countrywide injects yet more arguments about causation and reliance. *See, e.g.*, Motion at 24 n.6. Plaintiffs address those arguments in the following subsections.

⁸ Countrywide notes that Plaintiffs are required to establish proximate causation under RICO, *see* Motion at 22-23, but it conflates its discussion of causation with proximate causation in another portion of its moving papers in which it does not address the RICO standards for proximate causation, *see id.* at 15-17. Plaintiffs will nonetheless explain why they adequately allege proximate causation.

violation of section 1962.’ 18 U.S.C. § 1964(c). And the Supreme Court has already told us that ‘by reason of’ incorporates a proximate cause standard, *see Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992), which is generous enough to include the unintended, though foreseeable, consequences of RICO predicate acts

The Court also stated that there is “no room in the statutory language for an additional, amorphous requirement that, for an injury to be to business or property, the business or property interest have been the ‘direct target’ of the predicate act.” *Id.* Thus, if a plaintiff “properly alleges that his injuries were ‘by reason of a violation of section 1962,’ there is nothing to prevent him from ‘suing therefor.’ *See* 18 U.S.C. § 1964(c).” *Id.* at 902. *See also Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 773 (9th Cir 2002) (the injurious RICO conduct need only be “a substantial factor in the sequence of responsible causation”) (internal quotation omitted).

Further, Plaintiffs need not show that they relied on fraudulent statements. In *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138-39 (2008), the Supreme Court stated:

Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation. *See Neder v. United States*, 527 U.S. 1, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (“The common-law requiremen[t] of ‘justifiable reliance’ ... plainly ha[s] no place in the [mail, wire, or bank] fraud statutes”). And one can conduct the affairs of a qualifying enterprise through a pattern of such acts without anyone relying on a fraudulent misrepresentation.

Moreover, the Court stated, “Having rejected petitioners’ argument that reliance is an element of a civil RICO claim based on mail fraud, we see no reason to let that argument in through the back door by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of a common-law fraud claim.” *Id.* at 2142. The Court explained that if the defendants had not engaged in mail fraud, the plaintiffs would have had the opportunity to acquire valuable liens. *See id.* at 2138 (“[R]espondents lost the opportunity to acquire valuable liens. Accordingly, respondents were injured in their business or property by reason of petitioners’ violation of § 1962(c)) ...”).

Under those standards, Plaintiffs have adequately alleged proximate causation. If Defendants had not engaged in their RICO scheme, which required fraudulent appraisals, Plaintiffs would not have suffered the losses described in the preceding subsection of this Opposition. *See* FAC ¶¶ 205, 131, 141, 145, 150-151 (alleging causation and injury). Thus, Plaintiffs' losses were "a substantial factor in the sequence of responsible causation," *Oki*, 298 F.3d at 773.

3. The Complaint Adequately Alleges a Pattern of Racketeering Activity

a. Plaintiffs adequately allege closed-ended continuity

There is no merit to Countrywide's argument that the FAC fails to allege closed-ended continuity of the alleged racketeering activity. *See* Motion at 28-29. Countrywide bases its faulty argument on the incorrect premise that Plaintiffs only allege that the pattern of racketeering activity lasted from April 21, 2006, to September 27, 2006. *See* Motion at 28. Countrywide cobbles that distorted time period together by asserting that the FAC "only identifies three alleged specific uses of the mails to support the alleged pattern." *Id.*⁹

That argument falters for two reasons. First, the continuity of racketeering activity is not judged merely by the dates of mailings, which need not themselves constitute mail fraud. *See Schmuck v. United States*, 489 U.S. 705 (1989). Second, the pattern is not judged by conduct aimed only at specific plaintiffs. *See Brown v. Cassens*, 546 F.3d 347, 353 (6th Cir. 2008) ("As long as the defendant engaged in a pattern of racketeering activity, and the plaintiff was injured by this pattern of activity, this suffices to state a claim under 18 U.S.C. § 1964(c); nowhere does the statute require that the injury to each plaintiff must have independently consisted of a pattern of activity by the defendant.").

In fact, Plaintiffs allege that the racketeering activity lasted far more than a year. Plaintiffs specifically allege that Defendants' appraisal for plaintiffs Fabia and Maria Patron was done on February 26, 2006, and was fraudulent. *See* FAC ¶¶ 147-148. While

⁹ In a footnote to that assertion, Countrywide states, "Excluding the alleged transmission of an appraisal from C.S. Heaton to CHL." *Id.* at 28 n.7. Why Countrywide feels free to exclude that mailing is not explained.

1 that is not the actual starting date of the racketeering activity, it shows that the fraud
 2 began no later than that date. On the other end of the time continuum, Plaintiffs allege
 3 that Mark Zachary, a former Countrywide-KB Regional Vice President and Manager,
 4 filed a wrongful termination suit. FAC, ¶ 103. Zachary alleges that beginning in
 5 September 2006, he began questioning Countrywide-KB's use of fraudulent appraisals.
 6 FAC, ¶ 104. When Zachary brought his concerns to executives within Countrywide-KB,
 7 he was told that "that was they way KB Home wanted it." FAC, ¶ 105. Paragraph 106 of
 8 the FAC in this case then alleges:

9 Zachary continued to make this inflated appraisal issue
 10 known to Defendant's executives. For example, Zachary
 11 recounted in an e-mail dated May 11, 2007, to KB Homes
 12 executives and Countrywide-KB's Senior Vice President and
 13 Divisional Manager to whom Zachary reported, a letter from
 14 an appraiser to the appraiser's Area Appraiser Manager
 15 whereby the appraiser was told by the KB Homes Closing
 16 Coordinator that "*KB will not be able to continue doing
 business with him if he cannot hit the contract sales price on
 his appraisals*" and that the KB Homes Closing Coordinator
 stated that "*his past appraiser never missed the contract sales
 price even if he had to go outside of the given community to
 make value.*" Zachary went on to state in the e-mail that
 "[t]his is considered appraisal fraud."

17 Thus, Plaintiffs plainly allege that Defendants utilized fraudulent appraisals from at least
 18 February 2006 to at least May 2007. Further, the complaint cites to specific examples of
 19 the Scheme operating in February 2006 (FAC, ¶ 113, December 2005) (FAC, ¶ 117).
 20 And the proposed class period continues beyond 2007 in light of the fact this Scheme was
 21 the defendants way of doing business. *See* FAC, ¶ 167. That time period, which is
 22 conservative, sufficiently supports a finding of closed-ended continuity.

23 In light of those allegations, none of the cases cited by Countrywide supports its
 24 argument. For example, in *Turner v. Cook*, 362 F.3d 1219, 1231 (9th Cir. 2004), the
 25 Ninth Circuit held that the plaintiffs failed to allege closed-ended continuity, because
 26 "almost all of the alleged fraudulent communications occurred during the two month
 27 period between June and July of 2001, and the additional three categories of communica-
 28 tion occurred only sporadically in the preceding year." In contrast, Plaintiffs in this
 action allege that Defendants carried out their racketeering activity continuously for more

1 than a year, at the very least. Similarly, the other cases cited by Countrywide are inappo-
 2 site, because they involved finite schemes of short duration. *See Howard v. America*
 3 *Online, Inc.*, 208 F.3d 741, 750 (9th Cir. 2000) (no continuity where alleged inability of
 4 defendant to provide unlimited Internet access arose immediately after announcement of
 5 unlimited access, which “resulted in an overload of AOL’s network, and prevented or
 6 delayed many subscribers ability to access the Internet”); *Religious Tech. Ctr. v. Wol-*
 7 *lersheim*, 971 F.2d 364, 366 (9th Cir. 1992) (“Since the only goal of the Greene defend-
 8 ants was the successful prosecution of the *Wollersheim* state tort suit, there was no threat
 9 of activity continuing beyond the conclusion of that suit.... Thus the alleged activity
 10 continued for six months at most.”).

11 **b. Plaintiffs adequately allege open-ended continuity**

12 There is also no merit to Countrywide’s cursory argument that the FAC fails to
 13 allege open-ended continuity. Without any analysis, Countrywide merely asserts that the
 14 “FAC fails to state any facts that would support an inference that Defendants’ conduct,
 15 by its nature, threatened repetition, or that Defendants would continue its activity.”
 16 Motion at 30. To the contrary, Plaintiffs allege in detail that the racketeering activity was
 17 a regular way of conducting Defendants’ business, as explained throughout this brief.
 18 *See, e.g.*, FAC, ¶¶ 87-90, 93, 98-99, 104-106, 113, 115, 129-130, 139, 144, 148. Thus,
 19 Plaintiffs adequately allege open-ended continuity. *See H.J., Inc. v. Northwestern Bell*
 20 *Tel. Co.*, 492 U.S. 229, 243 (1989) (the “continuity requirement is likewise satisfied
 21 where it is shown that the predicates are a regular way of conducting defendant’s ongoing
 22 legitimate business (in the sense that it is not a business that exists for criminal purposes),
 23 or of conducting or participating in an ongoing and legitimate RICO ‘enterprise’”).

24 Indeed, courts routinely uphold claims of open-ended continuity where the alleged
 25 racketeering activity is a regular way of doing business that is not closed-ended by its
 26 nature. *See, e.g., Brown v. Cassens Transp. Co.*, 546 F.3d at 355 (complaint adequately
 27 alleged open-ended continuity by asserting that “the legitimate business or part of the
 28 legitimate business of each of the defendants ... is regularly conducted by fraudulently

denying benefits to which the employees are entitled through the use of fraudulent communications by mail and wire”); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1529 (9th Cir. 1995) (“Allwaste’s allegations, if proved, would suffice to establish that extorting kickbacks had become Defendant Hecht’s and Defendant Henebury’s regular way of doing business. Such a showing would satisfy the open-ended continuity requirement.... Because these activities were made possible by Hecht’s and Henebury’s employment status, were directed at a variety of Allwaste suppliers, and were not connected to the consummation of any particular transaction, there is nothing to suggest that they would have ceased unless Allwaste had intervened as it did.”); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) (open-ended continuity alleged based on two false annual reports in 12 months where defendant “was filing annual reports and there is no evidence that he would have stopped doing so if KLCL had not ceased to do business”); *Sun Sav. & Loan Ass’n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987) (four predicate acts over a two-month period satisfied the continuity requirement based on the threat of continued activity).

4. The Complaint Adequately Alleges Two RICO Enterprises

a. The “Countrywide Enterprise” Satisfies Any “Distinctiveness” Requirement

Countrywide incorrectly asserts that the Countrywide Enterprise does not satisfy the requirement that the defendants are distinct from the enterprise. *See* Motion at 30-31. Specifically, Countrywide asserts that “a parent corporation and its subsidiary lack sufficient distinctiveness to constitute a RICO ‘enterprise.’” Motion at 31. Countrywide does not address another case brought against it, in which the district court rejected that very argument. In *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 601 F. Supp. 2d 1201, 1212 (S.D. Cal. 2009), the plaintiffs alleged an enterprise comprising “(1) Countrywide, including its LandSafe loan closing services subsidiaries, and (2) Mid Atlantic Capital, One Source Mortgage, and other mortgage brokers not named as defendants herein who have contracts with Countrywide pursuant to which they sell, arrange, promote, or otherwise assist Countrywide in directing borrowers into loans

1 issued by Countrywide.” The defendants argued “assert these allegations are insufficient
2 because a parent corporation and its subsidiaries cannot legally constitute a RICO enter-
3 prise.” *Id.* at 1213. The district court rejected that argument, stating:

4 Plaintiffs allege that the decision to operate through the Land-
5 Safe Defendants facilitated the activity of the enterprise by
6 removing a potential for “checks and balances” from the loan
7 process. [Citation omitted.] Plaintiffs also allege that each
8 individual in the Countrywide Enterprise had a distinct role.
9 For instance, CHL was in the business of originating loans,
10 CT provided tax services in connection with the loans, Land-
11 Safe Inc. provided a variety of products during the closing
12 process, LandSafe Appraisal Services, Inc. provided appraisal
13 services, *etc.* *See Lorenz*, 1 F.3d at 1412 (“the plaintiff must
14 plead facts which, if assumed to be true, would clearly show
15 that the parent corporation played a role in the racketeering
16 activity which is distinct from the activities of its subsidi-
17 ary.”) These allegations satisfy the distinctiveness require-
18 ment, and are sufficient to withstand Defendants’ motion to
19 dismiss.

20 *Id.* at 1214-15.

21 For the same reasons, Plaintiffs’ allegations satisfy the distinctiveness requirement
22 in this case. Plaintiffs allege that the Countrywide Enterprise comprises Countrywide
23 and its LandSafe settlement services subsidiaries. FAC, ¶ 187. In addition, as in the
24 *Countrywide* case, Plaintiffs allege that Countrywide Home Loans originated loans (*see*,
25 *e.g.*, FAC, ¶¶ 37-48), that LandSafe, Inc. provided a variety of products during the clos-
26 ing process (FAC, ¶ 30), and that LandSafe Appraisal Services, Inc. provided appraisal
27 services (FAC, ¶¶ 31, 78-79). Therefore, Plaintiffs’ allegations satisfy the distinctiveness
28 requirement. *See also Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (en
banc) (“We take this opportunity to join the circuits that hold that an associated-in-fact
enterprise under RICO does not require any particular organizational structure, separate
or otherwise.”). Defendants do not assert this defense as to the Countrywide KB
Appraisal Enterprise.

b. Both Enterprises engaged in ongoing behavior

There is no merit to Countrywide's argument that Plaintiffs fails to allege that the Enterprises engaged in ongoing behavior. *See* Motion at 32-33.¹⁰ Countrywide's only argument is that "Plaintiffs' allegations of acts spanning just two months cannot satisfy the continuing unit element of RICO." Motion at 33. As shown above, Plaintiffs do not merely allege acts spanning just two months. Therefore, Countrywide's argument fails.

c. Plaintiffs are not required to allege that the members of the enterprise share a fraudulent purpose

Countrywide erroneously contends that all members of an enterprise must share a "fraudulent purpose." Motion at 33. In support of that argument, Countrywide cites only two Second Circuit cases, including *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004). Those cases are not good law in the Ninth Circuit, as the district court explained in *Friedman v. 24 Hour Fitness USA, Inc.*, 580 F. Supp. 2d 985 (C.D. Cal. 2008). In *Friedman*, the defendant cited *First Capital* to argue that the plaintiffs were required to allege that members of a RICO enterprise share a common *fraudulent* purpose. The court rejected that argument. First, the court explained that "Plaintiffs acknowledge that the Second Circuit appears to require a 'common fraudulent purpose.' ... However, the Second Circuit in *First Capital Asset Mgm't* did not explain its passing reference to such a requirement, nor can this Court discern the reasoning in the Southern District of New York line of cases to which the Second Circuit cited." *Id.* at 991 n.2. The court then stated that "[c]ontrary to Defendant's contention, the Ninth Circuit in *Odom* did not establish or affirm the proposition that the common purpose must be fraudulent." *Id.* at 991. Then, after discussing *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988), the *Friedman* court stated:

To require a common fraudulent purpose would essentially require each member of the enterprise to possess a fraudulent intent. *Feldman* teaches that such intent is *not* required for each member. This logically follows from the basic principle

¹⁰ In heading "ii" on page 32, Countrywide asserts that the Countrywide KB Appraisal Enterprise is not a continuing unit. However, in that subsection, Countrywide fails to make any argument to support its assertion.

that RICO enterprises may include “entirely legitimate” entities that are exploited by wrongdoers and the companion principle that not every member of an enterprise need be a co-defendant. *Id.* at 657.

580 F. Supp. 2d at 992. Thus, there is no merit to Countrywide’s argument that Plaintiffs must allege a fraudulent common purpose.

5. The RICO Conspiracy Claim is Adequately Alleged

Countrywide erroneously asserts that Plaintiffs’ RICO conspiracy claims fails. *See* Motion at 33. First, there is no merit to Countrywide’s argument that “[b]ecause Plaintiffs’ Section 1962(c) claim fails (as set forth above), their Section 1962(d) claim must fail as well.” *Id.* The premise of Countrywide’s argument is incorrect, because Plaintiffs have stated a valid claim under Section 1962(c), as explained above.

Similarly, there is no merit to Countrywide’s argument that the conspiracy claim must be dismissed because Plaintiffs allegedly fail to allege specific intent to defraud. *See* Motion at 34. Aside from the non sequitur of its placement in Countrywide’s challenge to the conspiracy count, there is no basis for Countrywide’s bald assertion that the Defendants “could not, under the facts, form the specific intent necessary to support a RICO claim.” Motion at 34. As the Ninth Circuit has explained in discussing Rule 9(b), “the third requirement [for mail fraud] – specific intent to deceive or defraud – requires only a showing of the defendants’ state of mind, for which general allegations are sufficient.” *Odom*, 486 F.3d at 554. As shown throughout this brief, Plaintiffs’ allegations of the RICO scheme adequately establish Countrywide’s illicit intent.

C. The Complaint Adequately Alleges a Claim Under the California UCL

1. Plaintiffs Have Standing Under the UCL

Countrywide incorrectly argues that Plaintiffs lack standing for their UCL claim because they “have not alleged, and cannot allege, an injury in fact because they did not rely on the subject appraisals, nor were they injured by them.” *See* Motion at 34. This is the same “plausibility” argument that Countrywide makes at the outset of its motion. Rather than burden the Court with senseless repetition, Plaintiffs refer the Court to its arguments in Section II(A) above. Further, for the same reasons that Plaintiffs’ injuries

1 flow directly from Defendants' RICO violations, proximate cause also exists for purposes
2 of the UCL. *See* Section II(B)(2), above.

3 **2. The Complaint Adequately Pleads a California Nexus**

4 There is no merit to Countrywide's argument that the UCL cannot be applied in
5 this action. *See* Motion at 34-35. Defendant KB Home makes the same unavailing argu-
6 ment in its motion to dismiss, and Plaintiffs address that argument at length in their oppo-
7 sition to KB Home's motion to dismiss. Rather than burden the Court by repeating that
8 argument here, Plaintiffs respectfully ask the Court to consider their response to KB
9 Home's motion to dismiss regarding this issue.

10 In short, Plaintiffs demonstrate in their opposition to KB Home's motion that
11 Defendants overlook the facts plainly alleged in the Complaint that Plaintiffs' injuries
12 were caused by conduct occurring *within and emanating from within* California's
13 borders, where KB Home, Countrywide and their joint venture are all headquartered.
14 The FAC alleges specific acts in furtherance of the scheme which occurred by and
15 through executives at Countrywide and KB Home headquarters, which are within
16 California. *See* FAC, ¶¶ 18, 43, 46, 48. The FAC also provides a detailed factual
17 explanation as to how the California resident parent companies, Countrywide and KB
18 Home, joined forces to create a sham affiliated business arrangement (ABA) under
19 RESPA, which was also operated out of California. FAC, ¶¶ 64-90. Moreover, the FAC
20 alleges that the Inflated Appraisal Scheme was implemented and conducted by
21 Defendants through their executives, from their headquarters. FAC, ¶¶ 83, 85, 90. In
22 addition, the FAC quotes from an anonymous letter sent to counsel that describes the
23 reach of the Scheme and the involvement of KB Home President and CEO Jeff Mezger
24 and former Countrywide Senior Vice President James Hecht. FAC, ¶¶ 91-92.

25 The FAC includes other allegations that support the application of the UCL in this
26 action. The FAC includes an email from a Countrywide loan officer in California setting
27 up a meeting with a LandSafe appraisal manager to explain how and when to inflate or
28 "push" values. FAC, ¶¶ 100-101. The FAC includes specific factual allegations from the

1 complaint filed by former Countrywide-KB executive Mark Zachary, who describes that
 2 Countrywide-KB executives had knowledge of and participated in and endorsed the
 3 Inflated Appraisal Scheme. FAC, ¶¶ 103-110. The FAC also plainly alleges that
 4 practices originating in and emanating from California were then implemented in Arizona
 5 and throughout the United States. FAC, ¶¶ 111, 193, 195, 200, 202, 216.

6 Thus, far from “all of the alleged conduct is alleged to have occurred in Arizona
 7 and allegedly was directed at Arizona residents” (Motion at 35), the FAC is replete with
 8 specific factual contentions detailing how the Inflated Appraisal Scheme was developed,
 9 implemented, orchestrated and carried out by and through the California operations of
 10 KB Home, Countrywide, LandSafe, the Countrywide-KB joint venture, and the
 11 Countrywide KB Criminal Enterprise. For these reasons, Plaintiffs have sufficiently pled
 12 a nexus to support their claims under the California UCL.

13 **3. The Complaint Alleges a Claim Under the UCL**

14 Countrywide incorrectly argues that Plaintiffs have insufficiently pled the unlaw-
 15 ful prong of the UCL. *See* Motion at 35-37. “With respect to the unlawful prong,
 16 virtually any state, federal or local law can serve as the predicate for an action under
 17 section 17200.” *See People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App.
 18 4th 508, 515 (2002); *see also Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 562-
 19 564 (1995) (reversing trial court order sustaining demurrer to UCL unlawful prong action
 20 based on violation of federal Fair Credit Reporting Act). The California Supreme Court
 21 agrees. *See, e.g., Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 24 Cal. 4th
 22 800, 828 n.9 (2001) (“Plaintiffs may, however, pursue their tortious interference and
 23 UCL claims to the extent they are predicated on their RICO claims because conducting
 24 an enterprise through a pattern of racketeering activity establishes a wrongful interference
 25 [citation] and an unlawful business practice [citation].”). And so have federal courts.
 26 *See, e.g., Citizens for a Better Env’t v. Union Oil*, 996 F. Supp. 934, 938 (N.D. Cal. 1997)
 27 (“[D]efendant first asserts that a violation of § 17200 ... cannot be predicated on a
 28 violation of federal law. That assertion has no merit. ‘Virtually any law – federal, state or

1 local – can serve as a predicate for a § 17200 action’....The Court finds that § 17200
 2 liability can be predicated on a violation of the Clean Water Act.”); *Cazares v. Pac.*
 3 *Shore Funding*, 2006 U.S. Dist. Lexis 1081 (C.D. Cal. Jan. 3, 2006) (permitting UCL
 4 unlawful prong violation predicated on violation of federal Truth in Lending Act). In
 5 short, “Section 17200 is a broad statute designed to remedy violations of other laws, both
 6 state and federal.” *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082
 7 (9th Cir. 2007) (finding no underlying HIPAA violation to support unlawful prong
 8 violation).

9 Plaintiffs’ RICO claims, which as set forth above are properly pled, thus can
 10 provide the basis for a violation of the UCL. Countrywide’s attacks on Plaintiffs’
 11 RESPA and Arizona state law claims as a basis for UCL liability are also unavailing.

12 Countrywide insists that RESPA violations have not been adequately pled and
 13 even if they were, they are barred by RESPA’s one-year statute of limitations. However,
 14 the FAC pleads in intricate detail facts that support the allegations that the Countrywide-
 15 KB joint venture was a sham ABA and thus violates RESPA’s prohibition of such
 16 entities. FAC, ¶¶ 64-82. Just this year a California District Court ruled that the facts in
 17 the FAC that Defendants now claim do not state a RESPA violation do exactly that. In
 18 *Zaldana v. KB Home*, 2009 U.S. Dist. Lexis 42409 (N.D. Cal. May 8, 2009), Judge
 19 Chesney denied defendants’ (KB Home and Countrywide) motions to dismiss wherein
 20 they claimed that the Countrywide-KB joint venture fell within RESPA’s safe harbor.
 21 Judge Chesney held: “Further, contrary to defendants’ argument, Zaldana has adequately
 22 alleged that CKB [the Countrywide-KB joint venture] was a ‘sham’ affiliated business
 23 arrangement, and, consequently, that defendants are not entitled to the safe harbor
 24 provided by § 8(c)(4) of RESPA.” *Id.* at *4. Thus, Countrywide’s argument that these
 25 allegations do not meet the ‘unlawful’ or ‘unfair’ prongs of the UCL are unsupportable.

26 Countrywide’s statute of limitations argument fails because the relevant limita-
 27 tions period is not that in RESPA, but rather, that of the UCL. *See Cortez v. Purolator*
 28 *Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178-179 (2000) (“Any action on any UCL

1 cause of action is subject to the four-year period of limitations created by that section....
 2 We therefore reject defendant's claim that the shorter periods of limitation applicable to
 3 contractual or statutory wage claims govern a UCL action based on failure to pay
 4 wages."). Furthermore, Plaintiffs have pleaded tolling of the RESPA statute of
 5 limitations, which is available under Ninth Circuit precedent.¹¹

6 Moreover, Plaintiffs' allegations that KB Home violated USPAP support a UCL
 7 claim because those standards have been incorporated into federal regulations at 12
 8 C.F.R. § 34.44. *See Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 681 (2006)
 9 ("Virtually any law or regulation – federal or state, statutory or common law – can serve
 10 as a predicate for a Business and Professions Code section 17200 'unlawful' violation.").

11 Countrywide's argument that alleged violations of Arizona law cannot support a
 12 UCL claim is similarly unavailing. Countrywide attempts to add a new element to the
 13 pleading standard – *i.e.*, that to support a UCL claim, a defendant must actually have
 14 been criminally charged and prosecuted for the alleged violations of law. Countrywide
 15 cites no case for this proposition because there in none. Instead Countrywide argues that
 16 "Plaintiffs' suggestion that the Defendants or their agents have violated criminal law is
 17 just wrong as a matter of law, and insufficient to support this cause of action." The
 18 argument is nothing more than a thinly veiled refutation of the facts squarely alleged in
 19 the FAC. In a motion to dismiss, this Countrywide cannot do. Plaintiffs' factually
 20 supported allegations must be taken as true.

21 Finally, Countrywide contends that Plaintiffs have not adequately pleaded a UCL
 22 claim under the unfairness prong. But here, Countrywide simply restates its prior
 23 unavailing arguments that there was no statutory violations and there was no deception
 24 because the fraudulent appraisals at issue were completed after the home purchase
 25 agreements were executed. As explained above, these arguments fail. At least one court

26 ¹¹ *See* FAC, ¶¶ 156-65; *See Kay v. Wells Fargo & Co. N.A.*, 2007 WL 2141292, *3
 27 (N.D. Cal. 2007) (RESPA statute of limitations is not jurisdictional); *King v. California*,
 28 784 F.2d 910, 914-15 (9th Cir. 1986) (Truth-In-Lending Act (TILA) statute of limitations
 is not jurisdictional); *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157,
 1166-67 (7th Cir. 1997) (applying *King* to RESPA).

has already concluded that Countrywide deceived its customers. *See* FAC, ¶ 48 (“This scheme of pushing quantity over quality, including a lack of any analysis of reasonable criteria to ascertain the appropriateness of the loans Countrywide issued to its borrowers, was uniformly concealed from borrowers, just as it was concealed from the public.”) (citing and quoting *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1057 (C.D. Cal. 2008)). Countrywide’s sole case, *Ford v. Hotwire, Inc.*, 2007 U.S. Dist. Lexis 98370 (S.D. Cal. Nov. 19, 2007), is unpersuasive. There the District Court rejected Plaintiff’s claim under the “unfair” prong because the only mentioned statute was one concerning rental car rates and the case before concerned hotel rates. *Id.* at *12-13. Further the court found that Plaintiff there had not pleaded any facts in support of his contention that defendant’s act were “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Id.* at *13. In contrast, Plaintiffs here have tethered their claim to multiple applicable statutory and regulatory provisions, including RICO, RESPA, USPAP (12 C.F.R. § 33.44-45) and A.R.S. § 32-3633. The Inflated Appraisal Scheme, as detailed in the FAC, also squarely presents a compelling factual basis that Defendants’ acts were indeed “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.”

D. The Complaint Adequately Alleges a Claim for Unjust Enrichment

Countrywide argues that Plaintiffs cannot state a claim for unjust enrichment because (1) Plaintiffs executed contracts with “CHL”; and (2) Plaintiffs have a remedy provided at law. Motion at 38. The first argument fails because although “CHL” may have contracted with Plaintiffs to finance their homes, the contracts do not govern the claims at issue here, that is, there is no express term in the loan agreements that CHL would have necessarily breached by engaging in the Countrywide Criminal Enterprise and implementing the Inflated Appraisal Scheme. Further since CHL’s co-conspirators, KB Home, Countrywide-KB and Landsafe are not parties to the loan agreements, Plaintiffs have not, and cannot bring a breach of contract claim under the facts at issue here, thus the loan agreements do not govern this dispute and an unjust enrichment claim

1 is available. In *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339
 2 F.3d 1087, 1091-93 (9th Cir. 2003), the court held that there was not a contract that
 3 controlled the relationship between the parties because the defendant shareholders were
 4 not parties to the subject agreement, and thus unjust enrichment was an available claim.

5 Finally, Countrywide claims that it was not unjustly enriched because it only
 6 collected the lending and other settlement service fees provided for in the loan
 7 agreements. However that statement is in direct conflict with the facts alleged in the
 8 FAC, specifically that Countrywide profited from the Inflated Appraisal Scheme by
 9 garnering illicit profits from the sale of inflated loans in the secondary market (FAC, ¶
 10 85); that the appraisal fees were unearned because the fraudulent appraisals had no value
 11 (FAC, ¶ 126); and that the fees Countrywide collected resulted from illegal referrals and
 12 thus were not justly received. (FAC, ¶¶ 66-82).

13 III. CONCLUSION

14 Countrywide's motion should be denied in its entirety.

15 September 8, 2009

16 HAGENS BERMAN SOBOL SHAPIRO LLP

17 By s/ Robert B. Carey
 18 Robert B. Carey
 19 Donald Andrew St. John
 20 2425 East Camelback Road, Suite 650
 21 Phoenix, Arizona 85016

22 HAGENS BERMAN SOBOL SHAPIRO LLP

23 By s/ Steve W. Berman
 24 Steve W. Berman
 25 Thomas E. Loeser
 26 Genessa Stout
 27 1301 Fifth Avenue, Suite 2900
 28 Seattle, Washington 98101

Attorneys for Plaintiffs and the Proposed Class

CERTIFICATION OF SERVICE

I hereby certify that on September 8, 2009, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

Bruce A. Abbott, Esq.

Bruce.Abbott@mto.com

Jonathan Grant Brinson, Esq.

jonathan.brinson@bryancave.com

Robert B. Carey, Esq.

rcarey@hbsslaw.com

Thomas Loeser, Esq.

toml@hbsslaw.com

William Thomas Luzader, III, Esq.

william.luzader@bryancave.com

Robert W. Shely, Esq.

rwshely@bryancave.com

Donald Andrew St. John, Esq.

andy@hbsslaw.com

Genessa A. Stout, Esq.

genessa@hbsslaw.com

s/ Steve W. Berman